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No. 726

In the Supreme Court of the United States

OCTOBER TERM, 1967

ROBERT T. MATHIS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
MITCHELL ROGOVIN,
Assistant Attorney General,
JOSEPH J. CONNOLLY,
Assistant to the Solicitor General,
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (A. 6–8) is reported at 376 F. 2d 595.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1967, and a petition for rehearing was denied on May 25, 1967 (A. 9). The petition for a writ of certiorari was filed on June 26, 1967. Certiorari was granted on October 16, 1967 (389 U.S. 896). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether statements and documents obtained by an Internal Revenue Agent from petitioner while he was confined in a State penitentiary are inadmissible in evidence because petitioner was not advised of his constitutional rights.

2. Assuming that the statements were improperly admitted in evidence, whether the error was harmless.

3. Whether petitioner was deprived of a fair trial because the district court refused to interrupt the trial in order to hold a suppression hearing outside the presence of the jury.

STATUTE INVOLVED

18 U.S.C.:

> 287. *False, fictitious or fraudulent claims*
>
> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of Florida on two counts charging that he knowingly filed false claims against the government, in violation of 18 U.S.C. 287. He was sentenced to 30 months' imprisonment on each count, the sentences to run concurrently (A. 4).

The false claims charged in the indictment were claims for refunds made on petitioner's individual income tax returns (Form 1040A) for 1960 and 1961. Petitioner's return for 1960 was filed in the name of Robert Theodore Mathis, Sr., 244 Palmetto Avenue, Winter Haven, Florida. It reports wages of $4,800 from the "J. W. Johnson Construction Co., Newark 5, New Jersey," lists seven dependent children, and claims a refund of $885.60—the amount reported as taxes withheld by the employer (Govt. Ex. 1–A, A. 19, 105). A refund check in the amount of $885.60 was mailed to petitioner at the above address in April 1961 and negotiated by him (Govt. Ex. 3, A. 41–42, 107). The return for 1961 was filed in the name of Robert T. Mathis, 1710 Broxey Court, Winter Haven, Florida. It reports wages of $9,600 from the "Johnson Construction Company, Newark, N.J.," lists six dependent children, and claims a refund of $931.20 in taxes withheld by the employer (Govt. Ex. 2–A, A. 19, 106).[1]

The records of the Social Security Administration showed that petitioner had earnings for Social Security purposes from the U.S. Army for the first nine

[1] No refund check with respect to this return was offered in evidence, and it is unlikely that a refund check was ever issued because the information on the return indicated a balance due rather than a refund. After subtracting a standard deduction of $500 and seven personal exemptions totalling $4,200, the return shows taxable income of $4,900. The tax on this amount for 1961 was $1,074—$142.80 in excess of the amount claimed as taxes withheld by the employer. Section 287 of Title 18 U.S.C., by its terms, does not require proof that the individual received any satisfaction on his false claim.

months of 1960, but no earnings were reported for the remainder of 1960 or for the entire year 1961 (A. 81). An Internal Revenue Agent searched the official records pertaining to incorporated and unincorporated businesses in Essex County, New Jersey, and the Newark telephone directories for the years 1960–1962 and could find no listing for a J. W. Johnson Construction Company (A. 59–60).[2] And two acquaintances of petitioner, who had known him since childhood, testified that they saw him in Winter Haven at least two or three times a week during the latter part of 1960 and throughout 1961 and that he was not absent from the city for any extended time during that period (A. 44, 48–49).

Petitioner did not testify at trial and did not offer any evidence in his defense. The sole theory of his defense, as it appears in the record, was that the government had not proved by admissible evidence that he had filed the false tax returns.

The government's evidence showed that petitioner had admitted to an Internal Revenue Agent that he had filed the tax returns (A. 27–28, 30) and that petitioner had executed consent forms extending the statute of limitations for determining his tax liability for 1960 and 1961 (Govt. Ex. 1–C, A. 21, 109; Govt. Ex. 1–D, A. 21, 110; Govt. Ex. 2–B, A. 23, 111).[3] The

[2] The Revenue Agent also checked the Newark City Directories for 1957, 1958, 1964, and 1965 (no Directories were published in the intervening years) and could find no record of a J. W. Johnson Construction Company (A. 59–60).

[3] An assessment of tax must be made within three years after the return was filed; early returns are considered as filed on the last day prescribed for filing, normally April 15 (26 U.S.C.

government's handwriting expert compared the signatures on the consent forms with the signatures on the income tax returns and the refund check and testified that they were all written by "one and the same writer" (A. 85–86). The government also introduced evidence that petitioner had attempted to file two income tax returns for 1962—one in the name of "Larry L. Mathis" and one in the name of "R. T. Mathis"—both of which claimed refunds for taxes allegedly withheld by a New York construction company (Govt. Ex. 10, A. 78, 114, 119). The record shows that petitioner was in custody on State charges during June–December 1962 (A. 69), and indicates that he may have been in custody or on bail during the first half of that year (A. 49–51).

Petitioner moved to strike the testimony of the Revenue Agent and the handwriting expert on the grounds that his oral admissions and his signatures on the consent forms were obtained from him while he was incarcerated in the Florida State Penitentiary and that he had not been advised of his constitutional rights (A. 39, 90).

Revenue Agent John Lawless testified that his assignment was to determine the correct tax on the 1960 and 1961 returns which apparently had been filed by petitioner; he was not a criminal investigator (A. 28, 37). He visited petitioner at the penitentiary on Octo-

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6501(a), (b)(1)). The taxpayer and the Secretary or his delegate may agree to an extension of the period for assessment of tax (26 U.S.C. 6501(c) (4)). Taxpayers signify their consent to such an extension by executing Form 872, which was used in this case.

ber 30, 1964, to find out whether petitioner had filed the tax returns and, if so, to have him execute a consent form for an extension of the statute of limitations on the 1960 tax (A. 27). Petitioner acknowledged that he had filed the 1960 return, and he signed the consent form (A. 27–29). Lawless made a second visit to the penitentiary on March 2, 1965, to obtain petitioner's consent to an extension of the statute of limitations on the 1961 tax and to a further extension on the 1960 tax. Petitioner signed the consent forms and also acknowledged that he had filed the 1961 return (A. 29–30). The only matters discussed at these two interviews were whether petitioner had filed the returns and whether he would agree to extending the statute of limitations. On each occasion, Lawless explained the purpose of the consent form to petitioner and advised him that he was not required to sign it, but he did not further advise petitioner of his rights (A. 29, 31–32, 34–35). Lawless referred the case to the Intelligence Division for a criminal investigation on March 10, 1965 (A. 37).

The district court denied petitioner's motions to strike the testimony of Agent Lawless and the handwriting expert (A. 39, 90); and the court of appeals affirmed the conviction (A. 6–9).

SUMMARY OF ARGUMENT

I.

Petitioner's statements and his signatures on the consent forms were obtained by an Internal Revenue Agent during a routine civil investigation of petitioner's income tax liability. The fact that petitioner

was serving a State sentence when the agent interviewed him does not bring the case within the scope of the rules in *Miranda* v. *Arizona,* 384 U.S. 436. The safeguards there announced were designed to dispell certain compelling pressures, incident to the type of custodial interrogation exemplified by that case, which tend to inhibit the effective exercise of the right to remain silent. Although petitioner was interviewed while he was incarcerated in a State penitentiary, there was no semblance of deception or of pressure calculated to cause him to speak against his will. Unlike the defendants in *Miranda* and its companion cases, petitioner was not taken from familiar surroundings and subjected to police interrogation designed to elicit incriminatory statements for use in a criminal prosecution. The State sentence which petitioner was serving was wholly unrelated to the subject of the interviews. There was no reason for him to believe that anything he told or refused to tell the Revenue Agent could have had any effect on his confinement, and there was nothing in the agent's purpose or his manner which might be characterized as having a potential for undermining petitioner's desire to remain silent.

Petitioner's statements were made in response to the agent's question whether he had filed a particular tax return—a question which is an obvious and essential preliminary inquiry in all civil tax interviews between a taxpayer and a Revenue Agent. To apply the *Miranda* safeguards to that question, asked in the course of a civil investigation, merely because the individual happens to be in prison would be to extend the

application of the rules far beyond the policies on which they are based and to construct needless impediments to the government's ability to secure information of the type routinely sought from all citizens.

Petitioner also objects to the fact that the forms which he signed in the agent's presence—consents to the extension of the statute of limitations governing his tax liability—were utilized by the government's expert witness as handwriting exemplars. This was plainly proper under this Court's ruling in *Gilbert* v. *California*, 388 U.S. 263.

II

Even assuming that petitioner's statements were improperly admitted in evidence, the error was harmless under the test announced in *Chapman* v. *California*, 386 U.S. 18. *Chapman* does not require a finding that the jury did not consider the evidence; the test may be satisfied by a finding, beyond a reasonable doubt, that the extent to which the evidence is likely to have influenced the verdict is so negligible that reversal is not required in order to maintain the integrity of the constitutional protection involved. Petitioner's statements were offered only to prove that he had filed the tax returns. The government's other evidence, which was wholly uncontradicted, left the jury no reason to doubt that fact. The government's handwriting expert testified unequivocally that the same person who had signed the tax returns had also signed the consent forms which petitioner executed at the Revenue Agent's request. But, more than that, all

of the circumstances established by the evidence, including the internal evidence provided by the details of petitioner's tax returns, showed beyond peradventure that the scheme to defraud the revenue could only have been fostered by petitioner.

III

A separate hearing outside the presence of the jury to determine the admissibility of evidence under the *Miranda* rules is not invariably required. The policy of giving full protection to the privilege against self-incrimination may be satisfied (as it was in the present case) where the evidence at trial discloses all of the relevant facts and where the trial judge makes a finding, before the case is submitted to the jury, that the manner in which the evidence was obtained did not violate the defendant's Fifth Amendment rights. Any prejudice which may have resulted from the jury's learning that petitioner was incarcerated in a State prison was the result of his own tactics. Petitioner did not move before trial to suppress the evidence obtained by the Revenue Agent, although he knew well in advance of trial that the government intended to use it. When petitioner moved to suppress the evidence at trial, he did not inform the judge why a hearing outside the presence of the jury was desirable. And he disregarded the opportunity to cure any possible prejudice resulting from testimony as to his imprisonment by failing to request specific cautionary instructions.

ARGUMENT

I. THE ADMISSION INTO EVIDENCE OF STATEMENTS AND DOCUMENTS OBTAINED FROM PETITIONER DURING A CIVIL TAX INVESTIGATION DID NOT VIOLATE HIS PRIVILEGE AGAINST SELF-INCRIMINATION

The principal issue in this case is whether statements and documents obtained by an Internal Revenue Agent conducting a routine civil investigation of petitioner's tax returns are rendered inadmissible by the agent's failure to advise petitioner, who was then confined in a State prison, that he was not required to answer any questions and that he was entitled to the presence of an attorney. Over petitioner's objections at trial, the agent was permitted to testify that petitioner acknowledged that he had filed the tax returns and that the signatures thereon were his, and the consent forms signed by petitioner were admitted into evidence and used as exemplars by the government's handwriting expert. Petitioner contends that the admission of this evidence violated his privilege against self-incrimination because he was in custody at the time it was obtained and he was not first advised of his constitutional rights as prescribed by *Miranda* v. *Arizona*, 384 U.S. 436.[4] We submit, however, that this case

[4] "Constitutional rights" and other similar phrases are used herein as shorthand references for the full text of the warnings which must be given an individual who is taken into custody. *Miranda* holds that he must be warned, prior to any questioning, that he has the right to remain silent; that anything he says can be used against him in a court of law; that he has the right to the presence of an attorney; and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. 384 U.S. at 479; see *id.* at 444.

does not present any of the circumstances which were found by this Court in *Miranda* to jeopardize the effective exercise of the privilege against self-incrimination, and that the application of the *Miranda* rules to the case at bar is neither required nor appropriate.

A. THE REVENUE AGENT WAS NOT REQUIRED TO COMPLY WITH THE *MIRANDA* SAFEGUARDS IN THE CIRCUMSTANCES OF THIS CASE

1. We assume, with petitioner, that under this Court's decisions [5] petitioner had the right to refuse to answer the agent's questions on the ground that his responses might be used against him in a criminal prosecution. When an individual elects to respond to governmental inquiries, however, nothing in those decisions precludes the admissibility of such statements,[6] provided they were given "freely and voluntarily without any compelling influences." [7] The critical holding in *Miranda* is that at a certain point in the investigation of a criminal offense—when an individual "has

[5] *Marchetti* v. *United States*, No. 2, this Term (decided January 29, 1968); *Grosso* v. *United States*, No. 12, this Term (decided January 29, 1968); *Haynes* v. *United States*, No. 236, this Term (decided January 29, 1968); *Garrity* v. *New Jersey*, 385 U.S. 493; *Spevack* v. *Klein*, 385 U.S. 511; *Miranda* v. *Arizona*, 384 U.S. 436; *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70; *Malloy* v. *Hogan*, 378 U.S. 1, 6–8, 11–14.

[6] The following discussion deals primarily with petitioner's oral admissions that he filed the tax returns, on the theory that the inapplicability of the *Miranda* safeguards in the circumstances under which the statements were elicited should be conclusive on the question whether the consent forms were properly admitted. The admissibility of the consent forms under the holding in *Gilbert* v. *California*, 388 U.S. 263, is discussed *infra* at pp. 19–20.

[7] *Miranda* v. *Arizona*, 384 U.S. 436, 478.

been taken into custody or otherwise deprived of his freedom of action in any significant way"—the authorities must advise the individual of his right to remain silent and comply with other "procedural safeguards effective to secure the privilege against self-incrimination" in order to preserve the admissibility of any statement made during subsequent custodial interrogation (384 U.S. at 444). The *Miranda* opinion itself indicates that procedural safeguards are needed at this stage of a criminal investigation in order to dispell certain "compelling pressures" (*id.* at 467) which tend to deprive the individual of his ability to make and enforce a decision to remain silent.[8] When an individual is arrested by the police in connection with an unsolved crime, as were the defendants in *Miranda* and its companion cases, it is probable that subsequent interrogation will be designed to elicit incriminatory statements to be used in a criminal prosecution and that in pursuing this objective the authorities may employ techniques of interrogation, including extended questioning, calculated to defeat the individual's will to resist (384 U.S. at 455).[9] The individual's isolation

[8] See *Miranda* at 461: "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak." Compare *In re Gault*, 387 U.S. 1, 47.

[9] Compare *Escobedo* v. *Illinois*, 378 U.S. 478, 485, "Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt * * *," with *Miranda* at 444 n.4, "This [when a person has been taken into custody] is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." See also *Miranda* at 465; *Spano* v. *New York*, 360 U.S. 315, 323–324.

in a police-dominated atmosphere enhances the effectiveness of these practices, for he is deprived of the reassurance of his familiar surroundings and forcefully impressed with his interrogators' control of his future liberty (384 U.S. at 454–455).

The extent to which this combination of factors is found to exist should determine whether the *Miranda* safeguards are required in situations not presented by that case. The instant case is factually distinguishable from *Miranda* in two respects: Petitioner's confinement was not the result of any action taken by the agent who interviewed him;[10] and an income tax investigation—unlike the type of local crimes involved in *Miranda*, where the investigation is directed at determining the identity of an unknown offender—is usually focused from its inception on the ordinary civil obligations of the taxpayer whose return is being audited.[11] The relevant inquiries in this case, therefore, are whether the Revenue Agent was conducting

[10] In *Westover* v. *United States*, decided with *Miranda*, FBI agents interrogated and obtained a confession from a suspect who was being held in a local police station and who had been interrogated for two days, without being advised of his rights, by local police in the same stationhouse. Despite the fact that the FBI agents had advised the suspect of his rights, the Court held that the impact on the suspect was that of a continuous period of questioning from which the compelling pressures of the local interrogation had not been sufficiently removed; the Court specifically confined its holding to the particular facts of that case. See *Miranda* at 494–497; cf. *Clewis* v. *Texas*, 386 U.S. 707.

[11] See, *e.g.*, *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011; *Rickey* v. *United States*, 360 F. 2d 32 (C.A. 9), certiorari denied, 385 U.S. 835.

a criminal investigation at the time petitioner's statements were obtained, and whether the circumstances of petitioner's confinement served to undermine his will to refrain from answering the agent's questions.

2. It is clear from the record that petitioner was not the subject of a criminal investigation at the time his statements were made. Agent Lawless was not a criminal investigator; it was his duty, as soon as he found "definite indications of fraud or criminal potential," to refer the case to the Intelligence Division for criminal investigation (A. 37). Although he did refer the case on March 10, 1965, the interviews with petitioner preceded that reference.[12]

As outlined above (see statement, pp. 5–6), Lawless went to the penitentiary on October 30, 1964, for the sole purposes of determining whether the returns assigned to him had been filed by petitioner[13] and of obtaining his signature on a standard consent form for the 1960 return—a document which was efficacious only if petitioner had filed the return and which in no way enlarges the signer's criminal liability (A.

[12] The difference in procedures employed by the Internal Revenue Service for civil and criminal investigations is shown in the record by the fact that, after Lawless referred the case for criminal investigation, an Intelligence Division agent visited petitioner and advised him of his constitutional rights before asking any questions (A. 38). On this occasion, petitioner stated that "he preferred not to talk" (*ibid*).

[13] Lawless went to the penitentiary prior to making any investigation of the content of the returns (A. 31). Upon being assigned to determine the correct tax on the 1960 and 1961 returns filed by Robert Theodore Mathis, Sr. and Robert T. Mathis, his first step was to obtain the taxpayer's consent to an extension of the statute of limitations on the 1960 return so that any deficiency might be assessed (A. 28; note 14, *infra*).

28, 31).[14] At that time there was "no definite indication of anything which would cause [him] to refer it for [criminal] investigation" (A. 31).

Agent Lawless thereafter wrote to petitioner, enclosing additional consent forms for his signature (A. 33). When petitioner failed to execute and return the forms, Lawless again visited the penitentiary, on March 2, 1965, in order to obtain petitioner's consent to an extension of the statute of limitations on the 1961 tax and to a further extension on the 1960 tax (A. 29–30).[15] On this occasion Lawless also asked whether petitioner filed the 1961 return which had been assigned to him (A. 30). Lawless' investigation to this point showed "nothing conclusive" and he "had no way of knowing there would be a criminal prosecution" (A. 34).[16]

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[14] The statute of limitations for an assessment of tax on an individual return for 1960 expired on April 15, 1964 (26 U.S.C. 6501 (a), (b)). By an earlier consent form, executed on March 31, 1964, petitioner had agreed to an extension of the statute until December 31, 1964—within two months of Lawless' first visit to the penitentiary (Govt. Ex. 1–B, A. 21, 108). The record does not show how this consent form was obtained (See A. 35–36).

[15] The statute of limitations for an assessment of tax on a 1961 return would have expired on April 15, 1965—within 45 days of Lawless' March 1965 visit to the penitentiary (26 U.S.C. 6501(a), (b)). The extension on the 1960 return, which petitioner agreed to in October 1964, would have expired on June 30, 1965 (Govt. Ex. 1–C, A. 21, 109).

[16] The record shows that at some time in 1964 a preliminary inquiry was made in Newark, New Jersey, regarding the existence of a Johnson Construction Company, but there is no evidence that any findings of this inquiry to the extent that it failed to reveal any firm by that name, were disclosed to Agent Lawless (see A. 61–63). The other evidence introduced against

The only evidence which petitioner cites (Br. 7) to support his apparent contention that Agent Lawless was conducting a criminal investigation is Lawless' testimony that there was a "possibility" that he would refer the case for a criminal investigation (A. 31). This possibility, however, is inherent in every civil inquiry seeking to verify information which an individual is required by law to report truthfully to the government. We find nothing in the *Miranda* opinion which requires the government, in the course of a civil tax audit, to advise a taxpayer whom it finds in custody of his constitutional rights prior to requesting the taxpayer's consent to an extension of time for determining his civil tax liability. Conceivably, Agent Lawless could have limited his interviews to these requests, relying thereafter on intuition, or perhaps the advice of a handwriting analyst, to assure himself that he had obtained the consent of the taxpayer who had filed the returns. But since he was not pursuing a criminal investigation, there was no reason for Lawless to avoid putting this obvious and routine question directly to petitioner.

3. The record plainly shows, moreover, that petitioner was not subjected to the "menacing police inter-

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petitioner—a letter which he wrote to his wife showing that he attempted to file two tax refund claims for 1962 (Gov. Ex. 10, A. 78, 114–120)—was received from State authorities by Agent Derry of the Intelligence Division in February 1963 and retained by him in his office in Orlando, Florida, until June 1965, when he gave it to Agent Schilling of the Intelligence Division, who had been assigned to the Mathis case; it was not given to Agent Lawless, whose office was in Jacksonville, Florida, about 100 miles north of Orlando (A. 76–77).

rogation procedures" which lie at the root of the *Miranda* decision (384 U.S. at 457). On each visit to the penitentiary, Lawless asked petitioner only two questions: whether he had filed a particular tax return and whether he would agree to an extension of the statute of limitations. The difference between these interviews and the interrogation involved in *Miranda* and its companion cases[17] is too apparent to require argument. Indeed it is difficult to conceive of a situation in which an individual's confinement played a more insignificant part in his decision to answer the question of a government agent. Although most types of custody share certain similarities, the Court's analysis in *Miranda* indicates a finding that the type of custody involved in that case, combined with police interrogation, produced compelling pressures on the individual to speak against his will. There is no parallel here.

The Court emphasized that the defendants in *Miranda* and its companion cases were "swept from familiar surroundings into police custody" (384 U.S. at 461). Any effect which this dislocation might have on an individual's capacity to resist questioning is lacking in this case; petitioner was interviewed in surroundings which had been familiar to him for twenty months prior to Agent Lawless' first visit (see A. 69). Moreover, when a person is taken into custody and thereafter questioned about a criminal offense, he infers that there is some connection between his confinement and the suspicion that he was

[17] See *Miranda* at 456–457, 491–499.

involved in that crime. He is likely to believe, even in the absence of express statements by the police,[18] that his refusal to talk will heighten their suspicion, and consequently that he might obtain his immediate freedom either by admitting his guilt or by concocting an elaborate denial—which often entangles him in a web of contradictions that leads ultimately to a confession.[19] In the present case, however, petitioner could hardly believe that anything he might say to Agent Lawless could relieve him of any of the consequences of his State sentence. The fact that he was interviewed while in custody could have no special significance for petitioner, because anyone who wanted to talk with him had to come to the penitentiary.

4. It should be emphasized, finally, that nothing in the foregoing analysis would immunize "prison" interrogation from procedural safeguards in all cases. An individual's confinement in a penitentiary, combined with police interrogation seeking to elicit incriminatory statements for use in a criminal prosecution, may in some circumstances present the same "compelling pressures" which were found in *Miranda* to inhere in stationhouse interrogation. We find nothing in the rationale of *Miranda,* however, which indicates that an individual's confinement, in and of itself, uniformly requires the application of special procedural safeguards before the government may seek to obtain information from him. Although the point is not settled, *Miranda* may mean that in situations

[18] *Miranda* at 454; see *id.* at 461.

[19] See *Miranda* at 451–452; *Escobedo* v. *Illinois*, 378 U.S. 478; 482–483.

squarely within the framework of that case a court need determine only whether the warnings were given and need not inquire whether the particular interrogation was likely to compel the defendant to speak against his will.[20] But where the issue is whether the *Miranda* safeguards should be required in significantly different circumstances, the purpose and manner of the questioning, its duration, and the effect of the subject's confinement on his ability to resist this type of questioning are all relevant, as they were in *Miranda,* to the determination whether the situation is characterized by "inherently compelling pressures." Whatever facts may be presented by other instances of prison questioning, we submit that the circumstances of this case exhibit no "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (*Miranda* at 467).

B. THE CONSENT FORMS USED AS EXEMPLARS BY THE GOVERNMENT'S HANDWRITING EXPERT AT TRIAL ARE ADMISSIBLE UNDER THE DOCTRINE OF *GILBERT* v. *CALIFORNIA*, 388 U.S. 263

Presumably in support of his position that Agent Lawless was conducting a criminal investigation, petitioner contends (Br. 8) that Lawless asked him to sign the consent forms in order to obtain a sample of his handwriting for use in a criminal prosecution. This contention is entirely without foundation in the

[20] To the extent that *Miranda* has not foreclosed this inquiry, we would argue that, even if the warnings were required, there was nothing in the agent's question or the way in which it was asked which could conceivably have influenced petitioner to speak against his will.

record, and it appears to be an afterthought, since it was not raised either in petitioner's brief in the court of appeals or in the petition. But even if petitioner's signatures on the consent forms were obtained for the purpose of using them as handwriting exemplars at trial (which we do not concede) it is clear that the admission of the forms in evidence did not violate petitioner's privilege against self-incrimination. In *Gilbert* v. *California,* 388 U.S. 263, decided last Term, this Court held that "[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the Fifth Amendment's] protection" (*Id.* at 266–267). If, as *Gilbert* holds, petitioner could not have refused to give handwriting exemplars on self-incrimination grounds, it follows that procedural devices to safeguard the exercise of the privilege, such as the *Miranda* warnings, are not applicable. The consent forms were used at trial solely for the purpose of handwriting comparison, and they contained no communication relevant to the issues in the criminal prosecution.[21]

[21] Neither the consent forms themselves (Govt. Ex. 1–C, A. 20–21, 109; Govt. Ex. 1–D, A. 20–21, 110; Govt. Ex. 2–B, A. 22–23, 111) nor the testimony concerning their execution (A. 28–30, 32, 34) contains any statement that, by signing the forms, petitioner acknowledged that he had filed the particular returns which were introduced at trial. The only reasonable inference that can be drawn from the execution of a consent form is that the taxpayer agrees to an extension of time for the computation of tax on *his* return. If a deficiency is thereafter assessed, it is open to the taxpayer to claim that he did not file the return on which the assessment is based.

C. THE APPLICATION OF THE *MIRANDA* RULES TO CASES OF THIS KIND WOULD NEEDLESSLY HAMPER AGENCIES OF GOVERNMENT IN SECURING INFORMATION OF THE TYPE ROUTINELY SOUGHT FROM ALL CITIZENS

In view of the absence of compelling pressures on petitioner to answer the Revenue Agent's questions, reversal of the judgment below would seem to depend on a holding that the *Miranda* safeguards are required whenever the government seeks to obtain any information from an individual in prison. We suggest that such a broad holding is not necessary to protect the exercise of the Fifth Amendment privilege.

The 220,000 adult felony offenders in correctional institutions in the United States do not relinquish their contact with the civil functions of government during their confinement. Federal, State, and local governments have established procedures for collection of taxes, registration of automobiles, regulation of buildings and certain licensed businesses, and the satisfaction of claims against the government, to name only a few. In the performance of these functions, government requires certain information which can be obtained most conveniently, or perhaps exclusively, from the individual directly concerned. When the individual is in prison, government has no choice but to deal with him where it finds him. Indeed, an individual's contacts with civil agencies of government may sometimes be increased during his confinement because he often must rely on them to provide welfare payments for his family and to protect his property interests. In some instances a civil agency may have no responsibility for the enforcement of criminal

statutes, although it may make information provided by the individual available to law enforcement agencies. In other instances, like the present case, the agency may also have responsibility for investigating criminal offenses arising under its statutes. But it seems apparent that those situations in which the questioning of a prisoner during a criminal investigation presents inherently compelling pressures can be described with sufficient clarity to permit an appropriate application of the *Miranda* safeguards.

We submit, in brief, that when government is exercising a civil function or pursuing a civil investigation, the mere fact that the individual involved is serving a criminal sentence should not, in and of itself, require the adoption of those procedures which have been deemed necessary in the conduct of a criminal investigation or proceeding. To follow that course would be to apply the rules in disregard of the reasons which underlie them.

II. ASSUMING THAT PETITIONER'S STATEMENTS WERE IMPROPERLY ADMITTED, THE ERROR WAS HARMLESS

If the Court should hold that the admission of petitioner's statements violated his privilege against self-incrimination, we suggest that the error was harmless and does not require reversal of the judgment below. Rule 52(a), Fed. R. Crim. P.[22] Under

[22] Since there is no indication in the record that the statements were involuntary, we assume that a harmless error argument is not foreclosed by the Court's apparent holding that the admission of an involuntary confession may never be considered harmless. See *Chapman* v. *California*, 386 U.S. 18, 42–43 (Stewart, J., concurring).

the standard enunciated in *Chapman* v. *California*, 386 U.S. 18, the admission of evidence in violation of a defendant's constitutional rights may be held to be harmless error only if an appellate court finds beyond a reasonable doubt that the evidence did not contribute to the jury's verdict. We do not read *Chapman*, however, as requiring a finding that the jury disregarded or disbelieved the evidence; if the Court intended to limit harmless error to irrelevant or incredible evidence it could have done so in those terms. That is to say, an error in admitting evidence which serves merely to confirm a fact that is irresistible in view of the other evidence in the case may properly be held harmless without diluting the constitutional protection involved.

Petitioner's statements were offered only to prove that he had filed the tax returns. Since petitioner did not offer any evidence, the extent to which the jury is likely to have relied on the statements depends solely on the strength of the government's other evidence on this issue. The government offered direct evidence that petitioner had filed the returns through the testimony of a handwriting expert. That expert testified unequivocally that the same person who had signed the consent forms (admittedly executed by petitioner) had signed the tax returns and endorsed the 1960 refund check, and he demonstrated the similarities in the signatures to the jury through the use of enlargements of the exhibits (A. 86–89). On cross-examination, petitioner did not attempt to impeach the expert's method of analysis or his qualifications.

In addition, overwhelmingly persuasive circumstantial evidence established an incontestable link between petitioner and the tax returns. The most elementary assumption that can be made about the fraudulent scheme involved in this case is that the person who filed the returns had an economic interest in reporting an address at which he could receive the anticipated refund check. The government's evidence showed that the address reported on the 1961 return was petitioner's address; that the name of the taxpayer's wife was the name of petitioner's wife; and that the taxpayer's Social Security number was petitioner's number.[23] There was also evidence that petitioner had attempted to file two tax refund claims, under different names, for the year 1962.[24] The jury would not have been justified in concluding that this scheme had been fostered by someone other than petitioner who knew petitioner's Social Security number and wife's name; who knew that a fraudulent claim for taxes withheld by the fictitious Johnson Construction Company had succeeded in obtaining a refund check for 1960; who was able to intercept mail addressed to petitioner at two residences in 1960 and 1961; and who was able to cash sizeable checks made out to petitioner in Winter Haven, Florida.

In these circumstances, petitioner's statements that he had filed the tax returns were wholly cumulative and served only to corroborate a fact which the government's other evidence established beyond doubt.

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[23] Compare Govt. Ex. 2-A (A. 106) with Govt. Ex. 10 (A. 78, 116–117) and Govt. Ex. 11 (A. 80, 122).

[24] See Govt. Ex. 10 (A. 78, 114–120).

III. PETITIONER WAS NOT DEPRIVED OF A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO HOLD A SUPPRESSION HEARING OUTSIDE THE PRESENCE OF THE JURY

Petitioner apparently contends that the district court deprived him of his constitutional right to a fair trial, or, in the alternative, that it abused its discretion, by (a) refusing to hear his motion to suppress any evidence obtained from him by Agent Lawless, (b) refusing to hold a hearing on the admissibility of such evidence, and (c) refusing to hold a hearing outside the presence of the jury, as a result of which the jury heard testimony that he was incarcerated in the Florida State Penitentiary. These procedural contentions are without merit.

We assume, at the outset, that the constitutionally required procedures for determining the admissibility of statements at trials where the *Miranda* rules apply are the same as, or at least no more exacting than, the procedures required by *Jackson* v. *Denno,* 378 U.S. 368, for statements alleged to have been involuntarily made. In *Pinto* v. *Pierce,* 389 U.S. 31, decided this Term, the Court noted that it "has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances," and summarized the holding in *Jackson* v. *Denno* as a requirement that a challenged confession may not be introduced without an initial "determination by the trial judge of its voluntariness after an adequate hearing" (*Id.* at 32). It is clear from the record that the examination of Agent Lawless at trial was fully adequate to disclose all of the facts

necessary for the court's determination of the admissibility of the evidence, and petitioner does not contend that he was in any way prevented from making his case. A "hearing," in the sense of a separate proceeding solely on the question of the admissibility of the evidence, is not essential. *Pinto* v. *Pierce, supra.*[25] And the district court, although it reserved judgment on petitioner's motion to suppress the evidence (A. 21), did rule on petitioner's motions to strike the testimony of Agent Lawless (A. 39) and the government's handwriting expert, (A. 90), which were to the same effect and based on the same constitutional grounds as his motion to suppress.[26] Petitioner's argument, therefore, must be premised on the general notions of fairness embodied in the Due Process clause or directed toward the Court's exercise of supervisory power over criminal trials in federal courts. Cf. *Spencer* v. *Texas,* 385 U.S. 554, 565.

Petitioner principally contends that he was unable to obtain a fair trial because the jury learned that he was incarcerated in the Florida State Penitentiary. Whatever prejudice may have resulted from this knowledge, however, was occasioned by petitioner's tactics.

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[25] In *Pinto* v. *Pierce*, the Court stated the principal reason for holding voluntariness hearings outside the presence of the jury: "A confession by the defendant found to be involuntary by the trial judge is not to be heard by the jury which determines his guilt or innocence. Hence, because a disputed confession may be found involuntary and inadmissible by the judge, it would seem prudent to hold voluntariness hearings outside the presence of the jury." 389 U.S. at 32.

[26] The district court also ruled on several objections to the admission of the evidence on constitutional grounds. See A. 20–21, 23, 28.

In the absence of a specific rule establishing procedures for determining the admissibility of defendants' statements, some district courts have entertained pretrial motions to suppress. See Rules 12(b)(1), 41(e), Fed. R. Crim. P. No pretrial motion to suppress was made in the present case. Petitioner directs this Court's attention to the facts that counsel was appointed on May 4, 1966, that discovery was granted on June 6, 1966, and that trial began on June 22, 1966, and claims that there was "insufficient time" between the time when the documents were obtained from the government and trial to prepare a one-page motion to suppress the evidence (Br. 11). Compare Form 16, Fed. R. Crim. P.[27] The conduct of petitioner's counsel at trial, however, refutes any argument that he was previously unaware of the evidence which the government intended to introduce or the circumstances under which it was obtained.[28]

[27] When the court asked why he did not move before trial to suppress the evidence, counsel replied: "We didn't even know what they were going to introduce until now. We couldn't file a motion to suppress" (A. 21). This claim is inconsistent with the record and with petitioner's brief in this Court.

[28] When the government first introduced the consent forms—through the testimony of its first witness, a Revenue official who merely had custody of the documents and who knew nothing about Agent Lawless' interviews with petitioner—counsel objected and told the court, "* * * if it is used for comparison purposes, under the law it is not admissible and I can show that it is not admissible under the law as it stands right now" (A. 18). Again, in the testimony of the same witness, on the same issue, counsel told the court: "* * * This is a question of whether or not they obtained evidence illegally that they are going to use against this man, whether they forced him to

The alternative vehicle for excluding this type of evidence, which petitioner apparently chose to employ, is to move to suppress the statements at the time they are offered at trial. Although petitioner did move to suppress the consent forms, it is doubtful whether he properly moved for a hearing; it is even more doubtful whether he properly moved for a hearing outside the presence of the jury; and it is clear that he did not tell the court why he wanted a hearing outside the presence of the jury. Petitioner's motion consisted of the following statement: "Well, I will move to suppress that [the consent forms] now, and if you want to have a hearing on it, we have got to have it" (A. 21). Previously, when objecting to the admission of the consent forms, counsel had told the court, "Well, it is something I would like to talk about outside the presence of the jury" (A. 18), and "* * * I think we ought to have a hearing outside the presence of the jury" (A. 20). At no time did counsel attempt to advise the court that the defendant was in custody at the time the evidence was obtained and that a hearing outside the presence of the jury would serve either to exclude the evidence or to relieve him of the need to raise the custody issue at trial.[29] In these circum-

incriminate himself" (A. 21); moments later he stated: "I know, Judge, but they are using those signatures to incriminate him, and I am going to show how they received them" (A. 22).

[29] The following colloquy between the trial court and defense counsel at the outset of Agent Lawless' testimony demonstrates that the court had not been advised that petitioner was in prison at the time the evidence was obtained (A. 28):

> Mr. Lurie. If the Court please, at this time I am going to object to any questioning of this man unless * * * the

stances, it cannot fairly be said that the district court abused its discretion by failing to excuse the jury after the trial had begun in order to hold a hearing on petitioner's motion to suppress.

Any prejudice resulting from testimony as to petitioner's imprisonment could have been cured by specific instructions cautioning the jury not to consider that fact as evidence of petitioner's guilt. Cf. *Spencer* v. *Texas, supra,* at 562–563, *Michelson* v. *United States,* 335 U.S. 469, 485. Petitioner failed to request such an instruction, however, and he did not object to the court's failure to caution the jury on the use of this testimony.[30] Furthermore, petitioner did not move for a mistrial on the ground that he was prejudiced by the references to his imprisonment.

Government is prepared to prove that he was advised of his rights.

The COURT. I will overrule that. You don't have to advise everybody of his rights every time you ask him questions. * * *

Mr. LURIE. We have come to it in the case of Miranda vs. Arizona.

The COURT. Oh, no. Miranda says, If you arrest a man, you have a collar on him, you can't ask him any questions. That is all it says.

Mr. LURIE. Well, we will put the collar on him, Judge.

[30] After instructing the jury, the court asked counsel, "Have I overlooked any instruction, gentlemen, that you desire to discuss?" Petitioner's counsel replied, "Not that I know of." (A. 100). The court did instruct the jury that a person in custody has a right to refuse to answer any questions, and that the jury was not to consider petitioner's refusal to discuss the matter with Agent Schilling as evidence of his guilt. A. 97; see A. 38; cf. *Miranda* at 468 n.37.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH J. CONNOLLY,
Assistant to the Solicitor General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

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